

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SABRINA CHIN, on behalf of herself and all
others similarly situated,

Plaintiff,

-v-

RCN CORPORATION,

Defendant.

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No. 08 Civ. 7349 (RJS) (KNF)
ORDER ADOPTING REPORT AND
RECOMMENDATION

RICHARD J. SULLIVAN, District Judge:

Plaintiff Sabrina Chin commenced this purported class action on August 19, 2008 by filing the Class Action Complaint. (Doc. No. 1.) The complaint alleges that Defendant RCN Corporation violated the Consumer Fraud and Abuse Act, 18 U.S.C. § 1030, and various provisions of state law by promising its customers “fast and uncapped” broadband Internet service, when it in fact was engaging in a network-management practice called “throttling,” which was designed to prevent or delay customers from using the Internet in certain ways, including for “peer-to-peer” file sharing. After engaging in negotiations and preliminary discovery, the parties reached a settlement agreement. On June 22, 2009, the Court directed them to file a joint motion for preliminary approval of their class action settlement. (Doc. No. 22.) That joint motion was filed on July 31, 2009 (Doc. No. 29), and was referred to the Honorable Kevin N. Fox, Magistrate Judge, for a Report and Recommendation (Doc. No. 23). On January 22, 2010, the parties filed a supplemental joint motion that amended the proposed Class Action Settlement Agreement and Notice of Pendency and Settlement of Class Action, in light of the parties’ recent agreement regarding attorney’s fees and

expenses. (Doc. No. 36.)

Taken together, the two joint motions propose certifying a settlement class composed of all persons in the United States who subscribed to RCN broadband Internet service from August 19, 2003 to July 13, 2009 — a class believed to include roughly 300,000 members. The motions further propose that Sabrina Chin be appointed the class representative and that plaintiff's counsel Reese Richman LLP be appointed class counsel for the settlement. The proposed settlement agreement provides for injunctive relief requiring, among other things, (1) that RCN cease using all network-management practices that specifically affect peer-to-peer Internet traffic, for a period of eighteen months; (2) that RCN not engage in any network-management practices that are intended to curb or control congestion of the RCN broadband Internet network and that do not specifically target peer-to-peer transmissions, for an additional eighteen months; and (3) that if, after this period, RCN implements a new network-management practice related to peer-to-peer file sharing, it will give subscribers at least sixty days to opt out of their service without incurring a penalty. Finally, the proposed settlement awards attorney's fees of up to \$520,000, expenses of up to \$20,000, and an incentive award of \$3,000 to Chin.

On March 12, 2010, Judge Fox issued his Report and Recommendation. (Doc. No. 38 ("R&R").) In it, he recommended granting the joint motions in full and: "(1) certifying the proposed settlement class, pursuant to Fed. R. Civ. P. 23(b)(3); (2) appointing Chin class representative; (3) appointing Reese Richman LLP counsel for the settlement class, pursuant to Fed. R. Civ. P. 23(g); (4) approving, preliminarily, the Class Action Settlement Agreement (Docket Entry No. 31-2, as amended by Docket Entry No. 37-2); (5) approving the Notice of Pendency and Settlement of Class Action (Docket Entry No. 37-3); (6) directing th[at] Notice be distributed, in the manner set forth in paragraph 8.1 of the Agreement; and (7) scheduling a hearing for final approval of the

Agreement.” (R&R at 6-7.) In the Report, Judge Fox advised the parties that failure to file timely objections within fourteen days from service of the Report would constitute a waiver of those objections. *See* 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). No party has filed objections to the Report,¹ and the time to do so has expired. *Cf. Frank v. Johnson*, 968 F.2d 298 (2d Cir. 1993).

When no objections to a report and recommendation are made, the Court may adopt the report if there is no clear error on the face of the record. *Adee Motor Cars, LLC v. Amato*, 388 F. Supp. 2d 250, 253 (S.D.N.Y. 2005); *La Torres v. Walker*, 216 F. Supp. 2d 157, 159 (S.D.N.Y. 2000). After conducting a review of the record, the Court finds that Judge Fox’s well-reasoned and thorough Report and Recommendation is not facially erroneous. Accordingly, the Court adopts the Report and Recommendation in its entirety. For the reasons set forth therein, IT IS HEREBY ORDERED THAT:

- (1) The Court preliminarily certifies, for purposes of effectuating this settlement only, a settlement class of all persons in the United State who, between August 19, 2003 and July 31, 2009, subscribed to RCN’s broadband Internet service. Excluded from the settlement class are persons who will have timely and validly opted out of the settlement class pursuant to section 6 of the agreement.
- (2) The Court appoints Plaintiff Sabrina Chin as class representative.
- (3) The Court appoints Michael R. Reese of Reese Richman LLP as class counsel.
- (4) The Court preliminarily approves the Class Action Settlement Agreement (Doc. No. 31-2, as amended by Doc. No. 37-2).
- (5) The Court approves as to form and content the Notice of Pendency and Settlement of Class Action (Doc. No. 37-3), subject to the modification set forth in footnote four of the Report and Recommendation.
- (6) The Court directs the parties to distribute the Notice in the manner set forth in paragraph 8.1 of the agreement by April 21, 2010.

¹ To the contrary, the parties filed a joint statement of their non-opposition to the Report and Recommendation on March 16, 2010. (Doc. No. 39.)

(7) On June 4, 2010 at 9:30 a.m., the parties shall appear for a hearing for final approval of the agreement.

The Clerk of the Court is respectfully directed to terminate the motions found at Document Numbers 29 and 36.

SO ORDERED.

DATED: March 29, 2010
New York, New York



RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE